U.S. Department of Justice

Environment and Natural Resources Division

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November 21, 2019

VIA ECF

Honorable Renée Marie Bumb
District of New Jersey
Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, N.J. 08101

Re: United States v. Cassidy Painting Inc., et al.,
Civil Action No. 1:19-cv-18472-RMB-AMD

Dear Judge Bumb:

By this letter application the United States, on behalf of the Environmental Protection Agency ("EPA"), respectfully requests that the Court sign and enter the proposed Consent Decree, lodged with the Court on September 27, 2019, in the above-referenced action (ECF No. 2-1). All parties consent to the entry of the decree.

INTRODUCTION

The United States filed a complaint and lodged the proposed consent decree in this action on September 27, 2019. In the Complaint, the United States seeks recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., for costs incurred by EPA in conducting a removal action at the Superior Barrel and Drum Site in Gloucester County, New Jersey. The defendants named in the complaint are the companies listed as Settling Defendants in the proposed Consent Decree. Under the proposed Consent Decree, the Settling Defendants will reimburse a portion of the removal action costs incurred by EPA.

In accordance with Paragraph 32 of the proposed Consent Decree, the United States published a notice of the proposed Consent Decree in the Federal Register on October 4, 2019. 84 Fed. Reg. 53179-80. That notice informed the public that comments concerning the settlement could be filed with the Department of Justice within thirty days of the date of the notice. The comment period has ended, and the United States received no comments regarding

the settlement. The Defendants have already consented to entry of the Consent Decree without further notice. Consent Decree ¶ 32.

Because this settlement is fair, reasonable, and consistent with CERCLA's goals, we respectfully request that the Court approve the settlement by signing the Consent Decree on page 12 and entering it as a final judgment.

BACKGROUND

The Superior Barrel and Drum Site ("Site") consists of about 5.5 acres of property located at 798-830 Jacob Harris Lane, Elk Township, Gloucester County, New Jersey. Between approximately 1974 and 2012, the Superior Barrel and Drum Company and its principal, Thomas Toy, operated a drum reconditioning and disposal business at the Site. The property was and is owned by Thomas Toy and Melva Toy. The business began as a sole proprietorship in 1974, and the company was incorporated as Superior Barrel and Drum Co., Inc. ("Superior Barrel") in 1979.

In August 2013, Gloucester County personnel, New Jersey Department of Environmental Protection ("NJDEP") personnel, and EPA personnel inspected the Site. Thousands of containers were observed at the Site, in various states of deterioration. Field testing of samples indicated that materials found at the Site were corrosive, flammable, and/or contained volatile organic compounds ("VOCs"). At the request of the NJDEP, EPA conducted a removal assessment and removal action at the Site. The removal assessment identified numerous CERCLA hazardous substances, including benzene, toluene, trichloroethylene, tetrachloroethylene, ethylbenzene, xylene, polychlorinated biphenyls, lead, acetone, styrene, cyclohexane, cobalt, manganese, zinc, arsenic, copper, cadmium, nickel, antimony, butanol, naphthalene, phenol, methyl ethyl ketone, phthalates, and acetic acid.

In 2013-2014, EPA conducted a physical removal action, including securing the Site, sampling various media, removal of containers of hazardous substances, decontamination of tanks, clean-up of chemical storage and process areas, and off-site disposal of material removed from the Site. As documented through May 31, 2019, EPA has incurred more than $6.7 million in direct and indirect costs for its work relating to the Site, including the costs of assessment, physical removal action, and efforts to obtain cost recovery.

The United States began its efforts to recover EPA's costs for the Site by suing the owners and operators of the Site under CERCLA Section 107(a)(1) and (2), 42 U.S.C. § 9607(a)(1), (2). *See* Complaint in *United States v. Thomas Toy, et al*., Civ. A. No. 1:17-cv-7320-JHR-AMD, ECF Docket No. 1. An Order of Entry of Final Judgment by Default Against Defendants Thomas Toy, Melva Toy, and Superior Barrel and Drum Co., Inc., in that civil action was entered on April 20, 2018, in the amount of $6,370,093, the amount of EPA direct and indirect costs relating to the Site that had been documented as of April 20, 2017. Civ. A. No. 1:17-cv-7320-JHR-AMD, ECF Docket No. 9. The judgment held the three defendants jointly and severally liable. Superior Barrel is now defunct, and the United States has recovered only

approximately $4,500 to date from Thomas Toy and Melva Toy, leaving it with well over six million dollars in unrecovered costs.[1]

In addition to owners and operators of hazardous wastes sites, under CERCLA Section 107(a)(3), 42 U.S.C. § 9607(a)(3), any person who arranged for disposal or treatment of hazardous substances owned or possessed by such person at a facility owned or operated by another person containing such hazardous substances is also liable to the United States for EPA's costs of removal or remedial action. During Superior Barrel's years of operation, various companies arranged with Superior Barrel for used drums and/or other containers that they owned or possessed which contained CERCLA hazardous substances, mostly residues, to be taken to the Site for treatment or disposal. Each of the companies named in the Complaint and the proposed Consent Decree in this civil action is a company that the United States alleges arranged with Superior Barrel for such drums and/or other containers to be taken to the Site or is a successor in interest to such a company. These companies were identified through limited records that were found by EPA at the Site, as well as responses by the companies to EPA information requests. Some other arranger companies that were identified through the limited records are now defunct. Due to the limited nature of the records found at the Site, it is likely that there were other companies over the course of Superior Barrel's more than thirty years of operation that EPA was not able to identify that also sent used drums and/or other containers to the Site for treatment or disposal.

In 2017-2019, the United States conducted negotiations for cost recovery with the group of Settling Defendants named in the Complaint. Under the proposed Consent Decree in this action, *United States v. Cassidy Painting Inc., et al.*, D.N.J. No. 1:19-cv-18472-RMD-AMD, the group of Settling Defendants will pay $3.4 million, plus interest, to EPA, towards reimbursement of EPA's direct and indirect response costs relating to the Site. The United States is simultaneously seeking this Court's approval of a separate settlement, in a separate civil action, *United States v. Mahogany Company of Mays Landing, Inc.*, D.N.J. No. 1:19-cv-18481-RMD-AMD, with one other identified company that is alleged to have arranged for treatment or disposal of used drums and/or other containers containing hazardous substances, mostly residues, that were taken to the Site. That settlement is with Mahogany Company of Mays Landing, Inc. ("Mahogany"), which is not part of the group, and that settlement is based on ability-to-pay considerations. In that settlement, Mahogany will pay $375,000, plus interest, in five annual installments, to EPA. If the two settlements are approved by the Court, EPA will obtain a total of $3,775,000, plus interest, toward reimbursement of its approximately $6.7 million in direct and indirect removal action costs relating to the Site, or approximately 56%, from arranger

[1] On August 1, 2019, Thomas Toy entered a guilty plea to criminal charges against him under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.*, for knowingly storing hazardous waste without a permit, in violation of 42 U.S.C. § 6928(d)(2)(A), at the Site. *United States v. Thomas Toy*, D.N.J., Crim. No. 18-034 (RMB), ECF Docket No. 22. Thomas Toy is scheduled for sentencing on January 13, 2020. *Id.*, ECF Docket Runner dated 11/18/2019. The plea agreement provides at page 3 that Thomas Toy shall "complete a financial statement form acceptable to the United States prior to sentencing to be reviewed by the Financial Litigation Unit ("FLU") of the United States Attorney's Office for the District of New Jersey." *Id.*, ECF Docket No. 24.

companies. To the extent feasible, the United States will continue to seek recovery of its remaining unreimbursed costs relating to the Site from Thomas Toy and Melva Toy.

THE CONSENT DECREE

The proposed Consent Decree in this action, *United States v. Cassidy Painting Inc., et al.*, requires the group of Settling Defendants named in the Complaint to pay $3.4 million, plus interest from July 1, 2019 through the date of payment, to EPA for deposit in the EPA Hazardous Superfund, for Past Response Costs incurred by EPA through July 1, 2019 relating to the Site. Consent Decree ¶ 4.

The group of Settling Defendants comprises the following companies: Cassidy Painting Inc., Cleveland Steel Container Corporation, Coating Development Group, Inc., Congoleum Corporation, Durand Glass Manufacturing Company, LLC, Expert Management Inc., Atlantic Associates International Incorporated, d/b/a Hibrett Puratex, Incineration Recycling Services, Inc., Johnson Matthey Inc., LCRES Holdings, Inc., LCR Embedded Systems, Inc., LCR Electronics, Inc., Martin Corp., National Casein of New Jersey, National Chemical Laboratories of Pa., Inc., Occidental Chemical Corporation, Ocean Yachts, Inc., Polymeric Systems Inc., PRC-DeSoto International, Inc., Puritan Products, Inc., Recycle Inc. East, R.H. Sheppard Co., Inc., Richland Glass Co., Inc., Rohm and Haas Company, The Sherwin-Williams Company, Stem Brothers, Inc., Straight Arrow Products, Inc., Thermoseal Industries LLC, Trex Properties LLC, United Asphalt Co., VP Racing Fuels, Inc., and The Worthington Steel Company.

Subject to the reservations in Paragraph 15 of the Consent Decree, including liability for failure to make the required payment, the United States covenants not to sue the Settling Defendants for Past Response Costs. Consent Decree ¶ 14. As a result of the settlement, the Settling Defendants also receive contribution protection for Past Response Costs. Consent Decree ¶¶ 20, 21.

DISCUSSION

A court should enter a CERCLA consent decree if the decree "is fair, reasonable, and consistent with CERCLA's goals." *United States v. Se. Penn. Trans. Auth.*, 235 F.3d 817, 823 (3d Cir. 2000) (citing *United States v. Cannons Eng'g. Corp.*, 899 F.2d 79, 85 (1st Cir. 1990)). Because this Consent Decree meets this governing standard and no comments have been submitted that undermine this conclusion, the Court should enter the Consent Decree.

A court's "[r]eview of [a] proposed consent decree is 'highly deferential.'" *United States v. Nat'l R.R. Passenger Corp.*, No. Civ. A. 86-1094, 1999 WL 199659 (E.D. Pa. Apr. 6, 1999) (citing *United States v. Atlas Mineral & Chem. Inc.*, 851 F. Supp. 639, 648 (E.D. Pa. 1994)). This deference is founded upon the expertise of the government agencies that negotiate such decrees and the general public policy favoring settlements. *See In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003); *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 118 (2d Cir. 1992) ("Appellate courts ordinarily defer to the agency's expertise and the voluntary agreement of the parties in proposing the settlement."); *Cannons Eng'g Corp.*, 899 F.2d at 84. A court's task "is

to determine whether the settlement represents a reasonable compromise, all the while bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolution." *United States v. Kramer*, 19 F. Supp. 2d 273, 281 (D.N.J. 1998) (quoting *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680-81 (D.N.J. 1989)). "The policy favoring settlement, articulated in CERCLA, is especially strong where a consent decree has been negotiated by the Department of Justice on behalf of the EPA." *Kramer*, 19 F. Supp. 2d at 281 (citing *United States v. Cannons Eng'g*., 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990)); *see also United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991). The settlement of CERCLA cases is, thus, highly favored because it effectuates basic policy goals of CERCLA.

Fairness of a CERCLA settlement involves both procedural fairness and substantive fairness. *Cannons Eng'g*., 720 F. Supp. at 1039. Courts evaluate procedural fairness by considering the openness and candor of the bargaining process. *Cannons Eng'g.*, 899 F.2d at 86-88. In *Rohm & Haas*, the court found that, "where a settlement is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of Justice . . . a presumption of validity attaches to that agreement." 721 F. Supp. at 681 (citing *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 692 (S.D.N.Y. 1988)). Here, the proposed settlement is the result of a procedurally fair, arms-length bargaining process and the settlement is entitled to the presumption of validity. The United States began cost recovery negotiations with this group of defendants in 2017 and these negotiations were conducted, with considerable back and forth, over a two year period. Throughout the settlement process, the parties maintained adverse interests and were represented by sophisticated counsel. The group includes companies with substantial familiarity and experience with CERCLA, and the group hired a consultant to assist it in its internal evaluation. All negotiations were conducted at arms-length and in good faith. Thus, the Consent Decree is procedurally fair.

Courts analyze substantive fairness and reasonableness based upon such factors as the equity of the settlement, litigation risks including uncertainties related to limited information, and avoidance of transaction costs of litigation. *Cannons Eng'g.*, 899 F.2d at 86-90*; Kramer*, 19 F. Supp. 2d at 285-88; *see also Charles George Trucking*, 34 F.3d at 1089; *United States v. DiBiase*, 45 F.3d 541, 544-46 (1st Cir. 1995). In determining whether the settlement is equitable, one consideration is whether there is an "orphan share' attributable to defunct entities from which recovery would be sought if they were not defunct. *Kramer*, 19 F. Supp. 2d at 287-88. The appropriateness of settlement is based on the totality of the circumstances. *Cannons Eng'g*, 899 F.2d at 90. The Consent Decree requires this group of Settling Defendants, all arranger defendants, to pay approximately fifty percent of EPA's direct and indirect costs relating to the Site. In reaching this settlement amount with this group of arranger defendants, the United States considered the totality of the circumstances, including (a) a substantial "orphan share" exists attributable to defunct companies, including the operator company Superior Barrel and some arranger companies, (b) litigation risks exist due to limited information and other uncertainties described in the background section above, (c) settlement would reduce all parties' transaction costs and result in earlier payment to the Hazardous Substance Superfund, and (d) one of the arranger companies that sent a large number of used drums and/or other containers

containing hazardous substances, mostly residues, to the Site is not part of this group, *i.e.*, Mahogany. Thus, the Consent Decree is substantively fair and reasonable.

This settlement meets a primary objective of CERCLA because it provides that responsible parties will reimburse EPA for a reasonable portion of the costs it incurred in cleaning up the Site and thereby help to replenish the Hazardous Substance Superfund. And, the Consent Decree serves CERCLA's goal of reducing, where possible, litigation and transaction costs associated with response actions. *See Cannons Eng'g*., 899 F.2d at 90; *Rohm & Haas*, 721 F. Supp. at 696. This Consent Decree also advances the general public policy in favor of settlement to reduce costs to litigants and burdens on the courts. *See, e.g.*, *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). Thus, the Consent Decree is consistent with CERCLA's goals and is in the public interest.

CONCLUSION

The proposed Consent Decree is fair, reasonable, and consistent with CERCLA's goals. As such, the United States respectfully requests that the Court sign and enter the Consent Decree that was lodged with the Court on September 27, 2019 in this action, *United States v. Cassidy Painting, Inc., et al.*, D.N.J. No. 1:19-cv-18472-RMD-AMD. ECF No. 2-1. The signature line for the Court is on page 12 of the proposed Consent Decree.

Respectfully submitted,

s/ Elizabeth Yu
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cc: All counsel or other representatives of the Settling Defendants listed on the attached list (via U.S.P.S. mail)
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